IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON,		No. 33703-7-II
	Respondent,	
v.		
RONALD T. THEEL,		UNPUBLISHED OPINION
	Appellant.	

BRIDGEWATER, J. — Ronald T. Theel appeals his conviction for misdemeanor harassment. He argues that the trial court: (1) erroneously instructed the jury that it could convict him under an unconstitutional statute; (2) erroneously instructed the jury that it could convict him under an uncharged alternative means; and (3) erroneously instructed the jury on the definition of

"knowledge." The State concedes the first issue. But we are not bound by the State's concession and may consider other grounds. Because we hold that the trial court improperly instructed the jury on an uncharged alternative means, we do not consider the State's concession and will not address the other issues. We reverse.

FACTS

In 2005, Theel and Kristian Cugal had recently started "seeing each other." Report of Proceedings (RP) at 65. Cugal testified that Theel was "nice at first," but "became controlling and violent." RP at 65. During an argument, he sprayed "Oust" air freshener into her eyes. RP at 74. The next day, he threw hot coffee on her back. When she tried to call the police to report his abuse, he told her, "You're done, you're going to die," and he ran his finger across his throat. RP at 79.

Based on these facts, the State charged Theel with fourth degree felony harassment - threats to kill (domestic violence) contrary to RCW 9A.46.020(1)(a)(i) and .020(2)(b). In the amended information, the State charged:

[T]he said defendant, Ronald T. Theel, in Grays Harbor County, Washington, on or about March 28, 2005, did knowingly and without lawful authority, threaten to kill Kristian T. Cugal, a family or household member within the meaning of RCW 10.99 [sic], immediately or in the future, and by words or conduct placed Kristian T. Cugal in reasonable fear that the threat would be carried out.

Clerk's Papers (CP) at 1. The harassment statute, RCW 9A.46.020, provides that,

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
- (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
- (ii) To cause physical damage to the property of a person other than the actor; or

- (iii) To subject the person threatened or any other person to physical confinement or restraint; or
- (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
- (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
- (2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
- (b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

The State also charged him with fourth degree assault.

Despite charging Theel with harassment contrary only to RCW 9A.46.020(1)(a)(i), the court instructed the jury that a person commits the crime of harassment when he or she violates RCW 9A.46.020(1)(a)(i) or RCW 9A.46.020(1)(a)(iv). Thus, the trial court's "to convict" instruction included RCW 9A.46.020(1)(a)(iv) as an alternative means for convicting Theel. Jury instruction no. 6 stated:

To convict the defendant of the crime of Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 28, 2005, the defendant knowingly threatened:
- (a) to cause bodily injury immediately or in the future to Kristian T. Cugal, or
- (b) maliciously to do any act which was intended to substantially harm with respect to her physical or mental health or safety; and
- (2) That the words or conduct of the defendant placed Kristian T. Cugal in reasonable fear that the threat would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that elements (2), (3) and (4) and either element (1)(a) or element (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. *Elements* (1)(a) and (1)(b) are alternatives and only one need be proved.

Supplemental Clerk's Papers (SCP) at 5-6 (emphasis added). Even though the State had not charged Theel with violating RCW 9A.46.020(1)(a)(iv), neither the State nor the defense objected to these instructions.

After receiving these instructions, the jury found Theel guilty of misdemeanor harassment: "We, the jury, find the defendant, Ronald T. Theel, Guilty of the crime of **Harassment** as charged in Count 1." SCP at 9. The general verdict did not specify under which alternative the jury convicted Theel. The jury also returned a special verdict form finding that Theel did not threaten to kill Cugal.

ANALYSIS

Theel first argues that the trial court erroneously instructed the jury that it could convict him under an unconstitutional provision of the harassment statute. The State concedes this issue. But a party's concession regarding a matter of law is not binding on this court. *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). Because we rule that the trial court erred in instructing the jury on an uncharged alternative means, we do not need to reach the State's concession.

Accordingly, we turn to whether the trial court erroneously instructed the jury on an uncharged alternative means of committing harassment. Even though Theel did not object to the instructions at trial, "an instructional error affecting a constitutional right may be raised for the

first time on appeal" under RAP 2.5(a)(3). *State v. Vanoli*, 86 Wn. App. 643, 646, 937 P.2d 1166, *review denied*, 133 Wn.2d 1022 (1997). Furthermore, instructing the jury on an uncharged alternative means violates the defendant's "right to notice of the crime charged." *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Accordingly, the trial court's alleged instructional error affected the defendant's constitutional rights, and Theel may raise this issue for the first time on appeal.

The State argues that RCW 9A.46.020(1)(a)(iv) is not an uncharged alternative means. Instead, the State asserts that it is a lesser included offense of the charged felony harassment. Our Supreme Court prescribes a two-part test to determine whether an offense is a lesser included offense of a charged offense. "[F]irst, each of the elements of the lesser offense must be a necessary element of the offense *charged*; second, the evidence in the case must support an inference that the lesser crime was committed." *State v. Gamble*, 154 Wn.2d 457, 463, 114 P.3d 646 (2005) (quoting *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997)).

Applying this test, we find that RCW 9A.46.020(1)(a)(iv) includes elements that are not necessary to the charged felony and is therefore not a lesser included offense. The State charged Theel with felony harassment contrary to RCW 9A.46.020(2)(b). The elements of this offense are: (1) without lawful authority; (2) knowingly; (3) threatens to cause bodily injury immediately or in the future to the person threatened or to any other person; by (4) threatening to kill the threatened person or any other person. RCW 9A.46.020(2)(b). But RCW 9A.46.020(1)(a)(iv) requires a defendant to have acted maliciously, an element not necessary for the charged felony harassment. Because RCW 9A.46.020(1)(a)(iv) contains elements that are not necessary for the

offense charged, it fails the first part of the Supreme Court's test, and we do not reach the second part of the test. Therefore, RCW 9A.46.020(1)(a)(iv) is not a lesser included offense of RCW 9A.46.020(2)(b).

Next, we evaluate the trial court's instruction to determine whether it included an uncharged alternative means. Alternative means statutes provide more than one means of committing a single crime. *In re Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). When the information charges one of several alternative means, "it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed." *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

Applying this standard, we hold that the trial court erred in instructing the jury that it could consider alternative means by which Theel could have committed the crime of harassment. RCW 9A.46.020 provides four alternative means for committing harassment. See State v. Gill, 103 Wn. App. 435, 440, 13 P.3d 646 (2000). The State's amended information charged Theel with only one of these four means, RCW 9A.46.020(1)(a)(i). But the trial court instructed the jury that it could also consider RCW 9A.46.020(1)(a)(iv), one of the alternative means. Because the information charged only one of the alternatives, we hold that the trial court erred in instructing the jury that it could consider another alternative, RCW 9A.46.020(1)(a)(iv), in convicting Theel.

Where the instructional error favors the prevailing party, "it is presumed to be prejudicial unless it affirmatively appears the error was harmless." *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). Here, we cannot be sure that the jury convicted Theel under the charged

33703-7-II

means only. In addition, the State prevailed and offers no evidence that the error affirmatively appears to be harmless. Therefore, we presume the error was prejudicial. Consequently, we reverse and remand for new trial. We need not address the remaining issues.

Reversed and remanded for new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur:	Bridgewater, J.
Houghton, P.J.	
Hunt, J.	